No. 78-715

In the Supreme Court of the United States

OCTOBER TERM, 1978

A. ERNEST FITZGERALD, PETITIONER

v.

ELMER B. STAATS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioner, after being discharged from his federal employment, was reinstated with back pay. He sought an award of interest on the amount of back pay, and the Comptroller General declined to comply with his request. This district court (429 F. Supp. 933; Pet. App. 24-a to 29-a) and the court of appeals (578 F. 2d 435; Pet. App. 1-a to 23-a) held that interest may not be paid on awards of back pay. Petitioner apparently recognizes (Pet. 10) that he cannot prevail unless the doctrine of sovereign immunity is discarded, and accordingly he asks this Court to overrule a great number of cases that enforce the doctrine of sovereign immunity (Pet. 11-24).

The request that the Court discard the doctrine of sovereign immunity is not infrequently made. Earlier this Term the Court denied a petition for certiorari making such a request. *May Department Stores Co.* v. *Smith*, cert. denied, No. 77-1853 (Oct. 2, 1978). The Court has

consistently applied the doctrine. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976). *Testan* involved a claim of back pay, and sovereign immunity also prevents awards of interest on judgments against the United States. *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947) (a statutory provision for the award of "just compensation" does not authorize the award of interest).

Petitioner advances a number of arguments that, he contends, show that the doctrine of sovereign immunity should be abolished. These arguments miss the point. The question is not whether sovereign immunity should be abolished, but which branch of the government should make that decision. This Court consistently has held that the choice is for the Legislative Branch. Petitioner advances no reason why this Court now should assume the authority that, it has held, belongs to Congress, and petitioner's argument therefore is unavailing.

Petitioner also argues that the use of sovereign immunity is inappropriate in back pay cases because interest is simply an "ancillary remedy" (Pet. 24). This contention disregards *Thayer-West Point Hotel Co.*, in which the Court rejected the very argument petitioner makes here. It is enough, as the court of appeals pointed out (Pet. App. 16-a), that the federal statutes, despite setting out detailed remedies for wrongful discharge from employment, do not provide for awards of interest on awards of back pay. If the statute does not authorize awards of interest, the doctrine of sovereign immunity precludes a court from directing that interest be paid. Accord, *VanWinkle* v. *McLucas*, 537 F. 2d 246, 248 (6th Cir. 1976), cert. denied, 429 U.S. 1093 (1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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